QUESTIONS PRESENTED

This case involves an uncomplicated civil action for damages against petitioner, who is currently serving as President of the United States, for acts committed by him before he became President and therefore bearing no possible relation to his official responsibilities. Petitioner sought to have the action dismissed or stayed for the duration of his service in office, but made no showing in the District Court that the lawsuit — or any particular aspect of it — would in any way impair the functioning of the presidency. The following questions are presented:

1. Whether the Court of Appeals erred in holding that petitioner was not entitled as a matter of law to a postponement or a stay of all proceedings for the duration of his service in office, when such a postponement or stay would effectively operate as a grant of official immunity for acts beyond "the outer perimeter of [the President's] official responsibility," the limit for presidential immunity set forth in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), and when there was no showing of any threat to the functioning of the Executive Branch.

2. Whether the Court of Appeals erred in reversing an order granting petitioner what the District Court termed a "limited or temporary immunity from trial," Pet. App. 68, for acts beyond the outer perimeter of petitioner's official responsibilities as President, when there was no showing of any threat to the functioning of the Executive Branch.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1853

WILLIAM JEFFERSON CLINTON,

Petitioner,

—v.—

PAULA CORBIN JONES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

In Arkansas on May 8, 1991, respondent Paula Corbin Jones was a $6.35-an-hour state employee, and petitioner William Jefferson Clinton was the Governor. The complaint alleges that both were at the Excelsior Hotel in Little Rock that day for the Governor's Quality Management Conference. While working at the conference registration desk, Ms. Jones (Ms. Corbin at that time) and a coworker were approached by Danny Ferguson, a state trooper assigned to Governor Clinton's security detail. Trooper Ferguson told Ms. Jones that "[t]he Governor would like to meet with you" in a suite in the hotel, and gave her a piece of paper with the suite number written on it. When Ms. Jones wondered what the Governor

wanted, Trooper Ferguson responded, "It's okay, we do this all the time for the Governor." Trooper Ferguson then escorted Ms. Jones to the Governor's floor. Complaint ¶¶ 6-13.

Ms. Jones, who had never met the Governor before, entered his suite at his invitation. Small talk followed. Mr. Clinton asked Ms. Jones about her job. The Governor noted that David Harrington, an appointee of Mr. Clinton's who served as the director of Ms. Jones's agency and her superior there, was the Governor's "good friend." The Governor then made a series of verbal and physical sexual advances toward Ms. Jones, and undressed himself from the waist down. Horrified, Ms. Jones moved away from Mr. Clinton and said, "Look, I've got to go." Pulling up his pants, Mr. Clinton said, "If you get in trouble for leaving work, have Dave [Harrington] call me immediately and I'll take care of it." As Ms. Jones left, the Governor looked at her sternly and said: "You are smart. Let's keep this between ourselves." Visibly shaken and upset, Ms. Jones resumed her post downstairs. In the following hours and days, she told her coworker, friends and relatives about what had happened. Other than that, however, fearing for her job and for her relationship with her fiancé, she remained silent. She remained at her agency for the next twenty-one months, where she worked in constant fear of retaliation. She experienced what she perceived to be job retaliation for her refusal to submit to Mr. Clinton's advances. In 1993, Ms. Jones moved to California, and Mr. Clinton became President of the United States. Complaint ¶¶ 14-40, 48.

In January 1994, a widely publicized magazine article reported that, while Governor of Arkansas, Mr. Clinton regularly used members of his security detail to solicit women for sex with him. The article, which was apparently based upon the accounts of various Arkansas state troopers, reported that an unidentified trooper (clearly Mr. Ferguson) had told the magazine that, at Mr. Clinton's request, he had approached a woman named "Paula" and had escorted her to Mr. Clinton's room at the Excelsior Hotel. The article

reported (again clearly based upon statements of Mr. Ferguson) that Paula had told the trooper that "she was available to be Clinton's regular girlfriend if he so desired," and thus implied that Ms. Jones had had a sexual relationship with Mr. Clinton. Upset that individuals in Arkansas could (and did) identify her as the "Paula" in the article, and angry at the falsehoods that had damaged her reputation, Ms. Jones publicly stated in February 1994 that she had rebuffed Mr. Clinton's advances. She also asked Mr. Clinton to acknowledge that fact. Instead, through press spokespersons, Mr. Clinton denied ever having met Ms. Jones, publicly branded her a liar, and thus further damaged her reputation. Complaint ¶¶ 41-51.

On May 6, 1994, Ms. Jones commenced an action against Mr. Clinton and Mr. Ferguson in the United States District Court for the Eastern District of Arkansas. Alleging the facts summarized above, her complaint asserts a claim under 42 U.S.C. § 1983 (1994) that Mr. Clinton, acting under color of state law, violated her constitutional rights to equal protection and due process by sexually harassing and assaulting her, as well as a claim under 42 U.S.C. § 1985 that Mr. Clinton and Mr. Ferguson had conspired to violate those rights. Her complaint also asserts two claims under Arkansas common law, one for intentional infliction of emotional distress against Mr. Clinton, and one for defamation against both Mr. Clinton and Mr. Ferguson. Complaint ¶¶ 58-79.

Mr. Ferguson answered the complaint on June 10, 1994. He admitted, among other things, "traveling in an elevator with plaintiff Paula Jones and pointing out a particular room of the hotel." Ferguson Answer ¶ 11. He disclaimed having "personal knowledge of what took place in the hotel room." *Id.* ¶ 14.

For his part, Mr. Clinton did not answer the complaint, but instead requested and obtained an order allowing him to defer a response pending a motion to dismiss on grounds of "presidential immunity." Pet App. 40. On August 10, 1994, Mr. Clinton filed what was styled a "Motion to Dismiss on Grounds of Presidential Immunity." *See* Pet. App. ii. As the

District Court noted, Mr. Clinton asserted "a claim of absolute immunity": "that he may not be sued in a civil action while sitting as President, even when the facts asserted by the Plaintiff occurred, if at all, before he was elected or assumed the office." Pet. App. 55. He principally argued that complaint should be dismissed without prejudice to being refiled after he leaves the White House; in the alternative, he argued that the District Court should stay the case until he leaves office. Pet. App. 55. Mr. Clinton's motion was predicated simply upon the fact of his occupancy of the Office of President of the United States. He made no factual showing that any aspect of the pretrial or trial proceedings would in any way hinder him from carrying out the duties of that Office.

The District Court denied the substance of Mr. Clinton's motion on December 28, 1994. Pet. App. 54. Rejecting Mr. Clinton's claim of absolute immunity, the court denied the motion to dismiss. The court observed that "[n]owhere in the Constitution, congressional acts, or the writings of any judge or scholar, may any credible support . . . be found" for Mr. Clinton's claim that he has "immunity from civil causes of action arising prior to [his] assuming the office" of the presidency. Pet. App. 68. The court found Mr. Clinton's contention to be "contrary to our form of government, which asserts as did the English in the Magna Carta and the Petition of Right, that even the sovereign is subject to God and the law." Pet. App. 68. Nevertheless, in a self-contradictory holding premised upon isolated language in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), the District Court granted Mr. Clinton what it called a "limited or temporary immunity from trial." Pet. App. 68; *see also id.* at 70 (noting that its holding "amounts to the granting of temporary or limited immunity from trial as *Fitzgerald* seems to require"). Without offering any reason why a trial, however brief, would interfere with Mr. Clinton's official duties, the court ordered an indefinite postponement of the trial against both Mr. Clinton and Mr. Ferguson pending the completion of Mr. Clinton's term in office, whether that be in 1997 or 2001. Pet. App. 68-71. The

court nonetheless held that discovery could proceed because "[t]here would seem to be no reason why the discovery and deposition process could not proceed as to all persons including the President himself." Pet App. 71.

Mr. Clinton appealed the rejection of his full immunity defense, Ms. Jones cross-appealed the grant of "limited or temporary immunity from trial," and on February 24, 1995, the District Court ordered a stay of all proceedings, including discovery, pending the appeal. Pet. App. 74.

On January 9, 1996, a divided panel of the United States Court of Appeals for the Eighth Circuit affirmed in part and reversed in part. Pet. App. 1. The Eighth Circuit held that nothing in the Constitution or in this Court's immunity case law lent support to Mr. Clinton's claim of immunity, as there had *never* been "any case in which any public official . . . has been granted any immunity from suit for his *unofficial* acts." Pet App. 7 (emphasis added). The Court of Appeals noted that, to the contrary, this Court's decision in *Nixon* v. *Fitzgerald* had recognized a presidential immunity that extended only to " 'acts within the 'outer perimeter' of [the President's] official responsibility,' " and that "unofficial acts" are "[b]y definition . . . not within the perimeter of the President's official responsibility at all, even the outer perimeter." Pet. App. 8-9 (quoting *Fitzgerald*, 457 U.S. at 756). The court concluded that *Fitzgerald*'s rationale — "that, without protection from civil liability for his *official* acts, the President would make (or refrain from making) official decisions, not in the best interests of the nation, but in an effort to avoid lawsuits and personal liability" — is "inapposite where only personal, private conduct by a President is at issue." Pet. App. 11 (emphasis added). The District Court's denial of Mr. Clinton's motion to dismiss was accordingly affirmed.

The Court of Appeals reversed the District Court's grant of a "limited or temporary immunity from trial" for the same reasons. While recognizing that "[t]he trial court has broad discretion to control the scheduling of events in matters on

its docket," Pet. App. 13 (footnote omitted), the Court of Appeals held that, to the extent the District Court's grant of such an immunity could be characterized as an exercise of that discretion, the District Court's postponement of trial was an "abuse of discretion" because it was "the functional equivalent of a grant of temporary immunity to which . . . Mr. Clinton is not constitutionally entitled," *id.* at 13 n.9. The Court of Appeals stressed that the District Court had considerable power to ensure that the litigation would not interfere with Mr. Clinton's official duties, and it directed the District Court to engage in "judicial case management sensitive to the burdens of the presidency and the demands of the President's schedule," Pet. App. 13:

> We have every confidence that the District Court will exercise its [scheduling] discretion in such a way that this lawsuit may move forward with the reasonable dispatch that is desirable in all cases, without creating scheduling conflicts that would thwart the President's performance of his official duties. . . .
>
> If, contrary to history and all reasonable expectations, a President ever becomes so burdened by private-wrong lawsuits that his attention to them would hinder him in carrying out the duties of his office, then clearly the courts would be duty-bound to exercise their discretion to control scheduling and the like so as to protect the President's ability to fulfill his constitutional responsibilities. . . .
>
> The discretion of the courts in suits such as this one comes into play, not in deciding on a case-by-case basis whether a civil complaint alleging private wrongs is sufficiently compelling so as to be permitted to proceed with an incumbent President as defendant, but in controlling the scheduling of the case as necessary to avoid interference with specific, particularized, clearly articulated presidential duties. If the trial preliminaries or the trial itself become barriers to the effective performance of his official duties, Mr. Clinton's remedy is to pursue motions for rescheduling, additional time, or continuances.

Pet. App. 13-16.

In a concurring opinion, Judge Beam emphasized that Mr. Clinton had failed to point out any "specific hardship or inequity" that would justify any stay of the litigation under this Court's decision in *Landis* v. *North American Co.*, 299 U.S. 248, 254-56 (1936). Pet. App. 20. Judge Beam observed that Mr. Clinton had "greatly overstated" the potential for "interbranch interference" that would result if the lawsuit were allowed to proceed. Pet. App. 21. Citing numerous occasions upon which past Presidents had given testimony, Judge Beam explained that the potential for such interference in this particular case was "not appreciably greater than those faced in many other instances in which a sitting President interfaces as a party, witness, or target with the judicial and legislative branches of the government." Pet. App. 22. He concluded:

> Ms. Jones's complaint presents relatively uncomplicated civil litigation, the discovery for which can and should be carried out with a minimum of impact on the President's schedule. It is doubtful, for instance, that more than one, perhaps two, face-to-face pretrial encounters between the President and Ms. Jones's representatives need to occur. Indeed, there is not even a requirement that parties be present at the trial of civil litigation and with some frequency they are not. At the bottom line, the availability of written interrogatories, written requests for admissions and written stipulations of undisputed facts, as allowed by the Federal Rules of Civil Procedure, would indicate that the actual impact of this litigation on the duties of the presidency, if that is Mr. Clinton's real concern, is being vastly magnified, especially assuming the trial judge's careful supervision of

> the litigation with maximum consideration of the President's constitutional duties. . . .
>
> As I have attempted to stress, *nothing [in our decision] prohibits the trial judge from halting or delaying or rescheduling any proposed action by any party at any time should she find that the duties of the presidency are even slightly impaired.*

Pet. App. 23-25 (emphasis added).

REASONS FOR DENYING THE WRIT

This one-of-a-kind case is singularly inappropriate for exercise of this Court's certiorari jurisdiction. There is no conflict among the Courts of Appeals, and so the question becomes whether Mr. Clinton has raised an important question of law that requires this Court's attention. SUP. CT. R. 10. He has not.

Mr. Clinton erroneously contends that the Court of Appeals held that "the President should receive no form of protection from . . . civil suits" for his unofficial acts. Pet. 9. The Court of Appeals stressed, however, that the district courts have ample authority — by solicitous scheduling — to ensure the unimpeded conduct of presidential business. As Judge Beam's concurrence emphasized, "nothing prohibits the trial judge from halting or delaying or rescheduling any proposed action by any party at any time should she find that the duties of the presidency are even *slightly* imperiled." Pet. App. 25 (emphasis added).

No peril would be posed for the presidency by allowing this case to proceed. This case has nothing to do with Mr. Clinton's official duties, and, as far as federal litigation goes, it is a very simple case. Not surprisingly, Mr. Clinton made no showing that his presidential duties would be impaired by this case. He attempted no such showing because he could not make one. This case thus presents neither a legal

issue nor a factual record that would justify review by this Court.

Beyond this, Mr. Clinton's contention that, under this Court's decision in *Nixon* v. *Fitzgerald*, he is "entitled, as a matter of law, to defer this litigation," Pet. 17, is completely unfounded and unworthy of review. It is tantamount to the argument — for *official* immunity for *unofficial* acts — that was repeatedly made by Mr. Clinton and rejected below. The argument was correctly rejected: as one *amicus* explained below in refuting Mr. Clinton's immunity claim, "[u]p to this time, *no* court has *ever* held that any person is immune from suit for damages for actions taken outside official, governmental responsibilities, even temporarily." Brief for *Amicus Curiae* American Civil Liberties Union Foundation in Support of Appellee Jones 17, *Jones* v. *Clinton*, Nos. 95-1050, 95-1167 (8th Cir. filed Apr. 28, 1995) (emphasis added). The farthest the Court has ever extended immunity is to "acts within the 'outer perimeter' of [the President's] official responsibility." *Nixon* v. *Fitzgerald*, 457 U.S. at 756. As Chief Justice Burger's concurring opinion in *Fitzgerald* explained, the President's immunity "*does not extend beyond such actions*," and "a President [is] *not immune for acts outside official duties*." *Id.* at 761 n.4, 759 (Burger, C.J., concurring) (emphasis added). The Court of Appeals simply applied what has long been understood to be the law. Its decision need not be reviewed by this Court.

Equally unworthy of review is Mr. Clinton's contention that the Court of Appeals erred in reversing the District Court's grant of an "immunity from trial." The Court of Appeals correctly found the trial judge's ruling to be an abuse of discretion because it was not an exercise of discretion; it was instead the "functional equivalent" — as the district judge herself made clear — "of a grant of temporary immunity to which . . . Mr. Clinton is not entitled." Pet. App. 13 n.9; *see id.* at 68. If analyzed as a discretionary stay of litigation, the District Court's holding manifestly failed to meet the

standards for such stays set forth by this Court in *Landis* v. *North American Co.*, 299 U.S. 248, 256 (1936): "[T]he burden of making out the justice and wisdom of a departure from the beaten track lay[s] heavily upon [the] suppliant[ ] for relief" — here Mr. Clinton — and a trial court's "discretion" is "abused if [a] stay [is] not kept within the bounds of moderation." There was no showing that a stay was justified, and the District Court's issuance of a categorical stay of trial until perhaps the year 2001 was certainly immoderate. The Court of Appeals' holding on this point is unassailable, and surely does not warrant review by this Court.

I. THIS CASE DOES NOT POSE ANY CONCEIVABLE THREAT TO THE FUNCTIONING OF THE EXECUTIVE BRANCH.

This case would not work any hardship upon the presidency. It is, at bottom, a very simple dispute about what happened in a very short encounter between two people in a room. There are only a handful of potentially important witnesses. One is Mr. Clinton himself, and presumably his counsel has already spent with him the short time required to obtain his recollection of events. By its nature, the case will not require the production of many documents. Discovery and trial in this case will not be burdensome, and can be controlled by the ample powers of the District Court to prevent any interference with official duties. Mr. Clinton has thus necessarily sought to advance his argument that this litigation might "interfere with [his] constitutionally assigned duties . . . without detailing *any* specific responsibilities or explaining how or the degree to which they are affected by the suit." Pet. App. 12 (emphasis added). He asks this Court to review his claims upon a record that is barren by his own choice. His petition can and should be denied for that reason alone.

Unable to present this Court with any factual record to support his contentions, Mr. Clinton instead asserts, as he did below, that this case will not be "an isolated one," that the courts will be "confronted with more private civil damage complaints against incumbent Presidents." Pet. 8, 21. As the Court of Appeals correctly noted, however, his assertions are "not only speculative, but historically unsupported." Pet. App. 14. In the 220-year history of the Republic, there apparently have been "only three prior instances in which sitting Presidents have been involved in litigation concerning their acts outside official presidential duties." Pet App. 14 n.10. The historical record reveals no claims of any presidential hardship in these cases, let alone any claims of presidential immunity. Although President Kennedy, invoking his status as Commander-in-Chief, did make an unsuccessful attempt to obtain a stay under the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. app. §§ 501-25 (1988 & Supp. V 1993), *see* Pet. App. 14 n.10, that fact, like Mr. Clinton's citation of the automatic stay provision of the Bankruptcy Code, Pet. 15,[1] only illustrates that the only proper forum for the relief Mr. Clinton seeks is Congress, not the courts.

There has been no onslaught of vexatious personal litigation against the President in the two years since this case was brought, even though the case has been highly publicized. Nor is such an onslaught likely: the President's "unofficial conduct will affect only those who traffic with [him] in his personal capacity," which of course makes "the universe of potential plaintiffs . . . considerably small[ ]" indeed. Pet. App. 15. Mr. Clinton's purported fear that political partisans will make litigation their vehicle of choice is obviously unfounded. As the Nation's political history shows, litigation

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[1] The automatic stay provision merely limits the ability of a creditor to proceed against a debtor in a forum other than the bankruptcy court. The creditor is provided an opportunity to immediately assert a claim in the bankruptcy court. Therefore, the automatic-stay analogy is inept.

is hardly necessary to accuse, attack, or embarrass a public figure. Indeed, if accusations against a public figure are unjustified or purely partisan, one would think that litigation — which gives the public figure access to discovery and to a neutral forum in which to obtain vindication — is the *least* likely mode of attack. Unlike so many others who have made charges against public officials, Ms. Jones has filed a verified complaint, subjected herself to discovery, and has submitted herself to the authority of a court empowered not only to dismiss her claims, but to impose sanctions under Fed. R. Civ. P. 11, the proper and effective tool for dealing with frivolous lawsuits, including those against Presidents.

No credible reason exists to believe that lawsuits against Presidents for unofficial conduct generally, let alone *this* lawsuit, present any problem for the practical functioning of the presidency. The lower courts have ample power to remedy any problems that might arise. That is the essence of the decision below: in rare cases such as these, trial courts can and will "exercise [their] discretion in such a way that [the] lawsuit[s] may move forward with the reasonable dispatch that is desirable in all cases, without creating scheduling conflicts that would thwart the President's performance of his official duties." Pet. App. 13-14. The trial judge remains completely free under the Court of Appeals' decision to "halt[ ] or delay[ ] or reschedul[e]" anything in the litigation — including a trial — "at any time should she find that the duties of the presidency are even *slightly* imperiled." Pet. App. 25 (emphasis added). In the past, moreover, presidents and former Presidents have given evidence under judicial supervision even on matters that were related to their office, without any ill effect. Pet. App. 22-23.[2] Indeed, Mr. Clinton himself

[2] *See, e.g., United States* v. *Fromme*, 405 F. Supp. 578, 582-83 (E.D. Cal. 1975); *see also United States* v. *Poindexter*, 732 F. Supp. 142, 143-146, 149-160 (D.D.C. 1990); 1 Ronald D. Rotunda & John E. Nowak, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 7.1 (2d ed. 1992); Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 278 (2d ed. 1988) (rejecting the view "that the President [is] beyond the pale of judicial direction").

recently testified at length by videotape deposition in an unrelated case in the District Court, which successfully and uncontroversially balanced the President's schedule with the rights of the litigants and the evidentiary needs of the case.[3] Mr. Clinton stated publicly that he saw nothing "inappropriate" in his being called to testify in that case, given that "Presidents since Thomas Jefferson from time to time have testified in court proceedings," and added that "[i]f . . . there's something that I know [that] can help the trial, I'll be happy to cooperate with the court."[4] And Mr. Clinton apparently either will be or has been subpoenaed to testify in yet another trial now scheduled to begin in June before the same District Judge who decided the immunity question below.[5]

Finally, Mr. Clinton offers no credible reason to believe that the exercise of judicial discretion over scheduling would give the trial judge a "general power to set priorities for the President's time and energies," or would require Mr. Clinton to seek judicial "approval to carry out [his] day-to-day responsibilities." Pet. 8, 12. The decision below neither contemplates nor compels any such judicial overreaching. To the contrary, it directs *deference* to the presidency; it mandates "judicial case management *sensitive* to the burdens of the

[3] *United States* v. *McDougal*, No. LR-CR-95-173 (E.D. Ark.); *see, e.g.*, Stephen Labaton, *Clinton Denies Any Link to Whitewater Case Loan*, N.Y. Times, May 10, 1996, § A, p. 1, col. 1; Alison Mitchell, *Clinton Is Ordered To Testify in Ex-Partners' Fraud Trial*, N.Y. Times, Feb. 6, 1996, § A, p. 16, col. 5; Ronald Smothers, *Judge Rules Clinton Testimony Will Be Videotaped for Trial*, N.Y. Times, Mar. 21, 1996, § A, p. 16, col. 1; Hugh Aynesworth, *Clinton Deposition Could Take 8 Hours, Judge Tells Lawyers*, Wash. Times, Apr. 18, 1996, part A, p. 18.

[4] Video Monitoring Services of America, Inc., Transcript of CNN Headline News Telecast, Feb. 7, 1996, 11:00-11:30 P.M. (EST).

[5] *United States* v. *Branscum*, No. LR-CR-96-49 (E.D. Ark.) (Wright, J.); *see, e.g.*, Glenn R. Simpson, *Whitewater Prosecutors Wrap Up Case Against Tucker and the McDougals*, Wall St. J., May 14, 1996,

presidency and the demands of the President's schedule," Pet. App. 13 (emphasis added); it orders the trial court to *refrain* from "creating scheduling conflicts" for the President, *id.* at 14. In the highly unlikely event that a district judge fails to heed these commands, the decision below contemplates "a writ of mandamus or prohibition" from the Court of Appeals. Pet. App. 16. And if somehow, someday, *both* a trial judge and a circuit court fail to respect the duties of the presidency — an even more unlikely event — the President may seek relief from this Court. If and when that day ever comes, perhaps there would be presented a record from which this Court could find that the prerogatives of the presidency were impaired. No such record exists here.

Mr. Clinton's petition, in short, fails to raise any substantial issue as to the institutional interests of the presidency. To show anything approaching a separation-of-powers violation under this Court's cases, he must, at a minimum, specifically identify "the extent to which [the challenged law or ruling] prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977). He has not done that here.

II. PETITIONER IS NOT "ENTITLED, AS A MATTER OF LAW, TO DEFER THIS LITIGATION" BECAUSE THE ACTS COMPLAINED OF ARE NOT WITHIN THE OUTER PERIMETER OF HIS OFFICIAL DUTIES.

In the proceedings below, Mr. Clinton consistently styled his claim as one of "immunity." He has now dropped that word, but the relief he seeks is effectively the same.[6] For

p. A6, col. 1; Linda S. Caillouet, *President Will Receive Subpoena in Perry County Bankers' Case*, Arkansas Democrat-Gazette, May 10, 1996, p. 13A.

[6] By dropping his use of the word "immunity" to describe the relief he seeks, Mr. Clinton apparently attempts to reconcile his contentions with those of the Solicitor General, who declined below to adopt Mr. Clinton's position that the immunity case law mandated the dismissal of the suit with leave to refile after Mr. Clinton leaves office. Instead, the Solicitor General argued that "the appropriate form of relief is a stay, rather than a dismissal." Brief for the United States as *Amicus Curiae* 5, *Jones* v. *Clinton*, Nos. 95-1050, 95-1167 (8th Cir. filed Apr. 5, 1995).

Since the views of the United States were fully expressed below, there is no need for the Court to invite the Solicitor General to file a brief on Mr. Clinton's petition. For the convenience of the Court, copies of the briefs filed by the Solicitor General in the Eighth Circuit have been lodged with the Clerk of the Court.

notwithstanding his advocacy of discretionary stays, he still contends that under *Nixon* v. *Fitzgerald* he is "entitled, as a matter of law, to defer this litigation" for the remainder of his presidency. Pet. 17. That is essentially the argument for presidential immunity that was made and rejected below, and it is not only incorrect, but unprecedented. None of the prior Presidents who were sued for nonpresidential acts (Presidents Theodore Roosevelt, Harry Truman, and John Kennedy) raised this defense. Yet another President, President Nixon, *twice* conceded to this Court that Presidents could indeed be sued for nonpresidential acts: first, at oral argument in *United States* v. *Nixon*, 418 U.S. 683 (1974), and then later, in his briefs in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982).[7]

[7] At oral argument in *United States* v. *Nixon*, White House Special Counsel James D. St. Clair expressly conceded that presidents could be sued for their unofficial conduct in personal matters:

> QUESTION: A president could be sued, couldn't he, for back taxes or penalties or what not?
>
> MR. ST. CLAIR: Well, in questions of immunity I think individually he could be . . . I think the President could be sued for back taxes in his individual capacity. But in terms of his power to effect the responsibilities of his office, to protect the presidency from unwarranted intrusions into the confidentiality of his communications, that's not a personal matter.

Transcript of Oral Argument 80, *United States* v. *Nixon*, Nos. 73-1766 and 73-1834 (U.S. argued July 8, 1974).

(*footnote continued*)

The decision below merely recognized Mr. Clinton's contention for what it is: a plea for a radical, unprecedented extension of immunity to acts never before covered by immunity — acts having *nothing* to do with a public official's duties. Whether the immunity is styled "temporal" or "absolute," whether it be enforced by dismissal or by stay, there is simply no authority for the protection Mr. Clinton seeks. He remains unable to cite, and the panel members below (including the dissent) were unable to find, "*any* case in which *any* public official ever has been granted any immunity from suit for his unofficial acts." Pet. App. 7 (emphasis added). In more than a century of immunity decisions, from *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335 (1872), to *Fitzgerald*, this Court has not once suggested that a public official could avoid litigation of a case involving only unofficial acts. The Court has never extended protection for public officials, including Presidents, beyond the clear boundary set in *Fitzgerald* — "the 'outer perimeter' of [the President's] *official responsibility*." 457 U.S. at 756 (emphasis added). To the contrary, as Chief Justice Burger's concurrence in *Fitzgerald* repeatedly stressed, the Court's cases have always presumed that protection of public officials from suit covers only *official* actions and "*does not extend beyond such actions*" — that "a President, like Members of Congress, judges, prosecutors, or congressional aides . . . [is] *not* immune for acts outside official duties." *Id.* at 761 n.4, 759 (Burger, C.J., concurring) (emphasis added). It was precisely *that* limitation that allowed Chief Justice Burger to declare that *Fitzgerald* did not "place [the] President 'above the law.' " *Id.* at 759 (Burger, C.J., concurring) (citation omitted).

President Nixon made the same concession in his reply brief in the *Fitzgerald* case. He stated that it was "clear that a President, in his capacity as a citizen, *always remains subject to suit for private wrongs*, but for improper actions as President, whether denominated 'political' or of a 'public character,' impeachment is the intended remedy." Reply Brief for Petitioner Richard Nixon 8-9 n.6, *Nixon* v. *Fitzgerald*, No. 79-1738 (U.S. filed Nov. 20, 1981) (emphasis added).

Fitzgerald surely does not, as Mr. Clinton asserts, suggest that "a sitting President may not be subjected to private civil lawsuits" relating to unofficial acts. Pet. 10. The controlling consideration in *Fitzgerald* — and, indeed, in all of this Court's immunity case law — is the fear that if the President and other officials could be sued for their official conduct, "executive officials would hesitate to exercise their discretion in a way 'injuriously affect[ing] the claims of particular individuals,' even when the public interest required bold and unhesitating action." *Fitzgerald*, 457 U.S. at 745 (quoting *Spalding* v. *Vilas*, 161 U.S. 483, 499 (1896)). Put simply, the Court's longstanding rationale for immunity is this:

> "*In exercising the functions of his office*, the head of an Executive Department, *keeping within the limits of his authority*, should not be under an apprehension that the motives that control his *official* conduct may, at any time, become the subject of inquiry in a civil suit for damages. It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if he were subjected to any such restraint."

Id. (quoting *Spalding* v. *Vilas*, 161 U.S. at 498).[8] As the Court of Appeals concluded, "[i]t is clear from a careful reading of *Fitzgerald*" that this Court was "concern[ed] that the President's awareness of his essentially infinite potential personal liability for virtually every official action he takes would have an adverse influence on the presidential decision-making pro-

[8] *See also, e.g.*, *Mireles* v. *Waco*, 502 U.S. 9, 10-11 (1991) (per curiam) (judges held immune for judicial acts so that they may act in official capacity without apprehension of personal liability); *Forrester* v. *White*, 484 U.S. 219, 226-29 (1988) (same); *Butz* v. *Economou*, 438 U.S. 478, 504-17 (1978) (same for executive agency officials); *Imbler* v. *Pachtman*, 424 U.S. 409, 424-431 (1976) (state prosecutors); *Scheuer* v. *Rhodes*, 416 U.S. 232, 240-49 (1974) (state executive officials); *Tenney* v. *Brandhove*, 341 U.S. 367, 376-79 (1951) (state legislators); *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335, 347-53 (1872) (judges).

cess," and might cause the President to "make (or refrain from making) official decisions, not in the best interests of the nation, but in an effort to avoid lawsuits and personal liability." Pet. App. 11. Nothing in *Fitzgerald* places a President, when acting personally, upon a pedestal above any other citizen in this democracy. To do so would contravene the Nation's egalitarian civic creed and the Constitution's guarantee of equal protection of the laws. As the Court of Appeals said below, Article II "did not create a monarchy. The President is cloaked with none of the attributes of sovereign immunity. To the contrary, the President, like all other government officials, is subject to the same laws that apply to all other members of our society." Pet. App. 6.

The Court of Appeals thus correctly found the rationale for official immunity to be entirely "inapposite" here, "where only personal, private conduct by a President is at issue." Pet. App. 11. Imposing liability for pre-presidential or other unofficial conduct will simply not cause Presidents to "hesitate to exercise their discretion in a way 'injuriously affect[ing] the claims of particular individuals.' " *Fitzgerald*, 457 U.S. at 744-45 (quoting *Spalding* v. *Vilas*, 161 U.S. at 499). It will not diminish a President's " 'ability to deal fearlessly and impartially with' the duties of his office." *Id.* at 752 (quoting *Ferri* v. *Ackerman*, 444 U.S. 193, 203 (1979)). It will not place the President " 'under an apprehension that the motives that control his official conduct may, at any time, become the subject of inquiry in a civil suit for damages.' " *Id.* at 745 (quoting *Spalding*, 161 U.S. at 498). And it will not require any court "to probe into the elements of Presidential decisionmaking," or to engage in "judicial questioning of Presidential acts, including the reasons for the decision, how it was arrived at, the information on which it was based, and who supplied the information." *Id.* at 761-62 (Burger, C.J., concurring).

Nor did the Court of Appeals "ignore" this Court's concern in *Fitzgerald* about the potential for the "diversion of [the President's] energies by concern with private lawsuits," as

Mr. Clinton contends. Pet. 9-10 (quoting *Fitzgerald*, 457 U.S. at 751). The Court of Appeals simply reached the unassailable conclusion that this potential was far less substantial in a case having nothing to do with official conduct, and that it could be amply addressed through the sound scheduling discretion of the trial court. The court correctly concluded — given the historical experience, and the fact that the "universe of potential plaintiffs" was so small as to unofficial conduct — that the danger of distraction here is "on a different footing" than in cases (like *Fitzgerald*) that involve official acts. Pet. App. 15. Still, far from "disregard[ing] [any] 'risk[ ] to the effective functioning of government,' " Pet. 10, the Court of Appeals made clear that the institutional interests of the presidency could and would be protected:

> If, contrary to history and all reasonable expectations, a President ever becomes so burdened by private-wrong lawsuits that his attention to them would hinder him in carrying out the duties of his office, *then clearly the courts would be duty-bound to exercise their discretion to control scheduling and the like so as to protect the President's ability to fulfill his constitutional responsibilities.* Frivolous claims, a category with which the courts are quite familiar, generally can be handled expeditiously and ordinarily can be terminated with little or no involvement by the person sued.

Pet. App. 15 (emphasis added).

Finally, Mr. Clinton's contention that "deep roots in our [Nation's] traditions" (Pet. 10) support his vision of the law, is as blind as that vision itself. He cites, for example, the views of President Jefferson and others, to the effect that " 'the President, personally, was not . . . subject to any process whatsoever.' " Pet. 10 (citation omitted). Even the District Court found this view meritless; it concluded, after analyzing the historical materials, that there was "no credible support" for it. Pet. App. 68; *see* Pet. App. 56-67. It is enough to know

that President Jefferson lost the point 189 years ago. *United States* v. *Burr*, 25 F. Cas. 187, 191-92 (C.C.D. Va. 1807) (No. 14,694) (Marshall, C.J.) ("That the president of the United States may be subpoenaed, and examined as a witness, . . . cannot be controverted."). And President Nixon lost it, too — *thrice*. *United States* v. *Nixon*, 418 U.S. 683 (1974) (ordering disclosure of official presidential communications despite claim of executive privilege); *National Treasury Employees Union* v. *Nixon*, 492 F.2d 587, 615 (D.C. Cir. 1974) (holding President amenable to judicial process in a *civil* case); *Nixon* v. *Sirica*, 487 F.2d 700, 789 (D.C. Cir. 1973) (en banc) (per curiam) (ordering President to comply with grand jury subpoena). Mr. Clinton's attempt to rewrite the historical record should be rejected, and his petition should be denied.

III. THE COURT OF APPEALS, IN A PROPER EXERCISE OF JURISDICTION, CORRECTLY REVERSED THE DISTRICT COURT'S GRANT OF TEMPORARY IMMUNITY FROM, OR A STAY OF, TRIAL.

A. Mr. Clinton also claims error in the Court of Appeals' reversal of what the District Court *itself* called a grant of a "limited or temporary *immunity* from trial." Pet. App. 68 (emphasis added); *see* Pet. 19. The Court of Appeals correctly found that what the District Court ordered — a postponement of the trial until perhaps the year *2001* — was "the functional equivalent of a grant of temporary immunity" that had no basis under the Constitution or laws of the United States. Pet. App. 13 n.9. As such, the District Court's decision was a manifest abuse of discretion even if reviewed under the settled law governing discretionary litigation stays.

The controlling precedent is *Landis* v. *North American Co.*, 299 U.S. 248 (1936), a case Mr. Clinton misconstrues. The Court in *Landis* did indeed hold that "the power to stay proceedings is incidental to the power inherent in every court to

control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Id.* at 254. But a stay of litigation may be granted "[o]nly in rare circumstances." *Id.* at 255. In particular, the Court held that "the suppliant for a stay must make out a *clear* case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else." *Id.* at 255 (emphasis added). Thus, "the burden of making out the justice and wisdom of a departure from the beaten track lay heavily on the . . . suppliant[ ] for relief, and discretion [is] abused if the stay [is] not kept within the bounds of moderation." *Id.* at 256.

In reversing the District Court's postponement of trial, the Court of Appeals was faithful to *Landis*. In granting trial "immunity" to Mr. Clinton, the District Court made no finding that Mr. Clinton had made a showing of an actual and "clear case of hardship," a showing not even attempted. As Judge Beam explained, moreover, the danger of harm to Ms. Jones was manifest: she "faces real dangers of loss of evidence through the unforeseeable calamities inevitable with the passage of time." Pet. App. 17. And the passage of time contemplated by the District Court's order — possibly into the next century — was surely immoderate. Indeed, in *Landis* itself, the Court found "the limits of a fair discretion" to have been "exceeded" by a stay that had suspended "the proceedings in the District Court . . . more than a year." 299 U.S. at 256. Reversal of the District Court's "stay" order, if anything, was all but *required* under *Landis*. And since the "stay," despite the District Court's citation of Fed. R. Civ. P. 40 and the court's equity powers, was dependent upon its erroneous holding that Mr. Clinton was entitled to an "immunity from trial as *Fitzgerald* seems to require," Pet. App. 70, it was properly reversed for that error as well. The Court of Appeals' conclusion was thus both uniquely circumstanced

and correct, and accordingly raises no issue warranting review by this Court.

B. Mr. Clinton makes a last-ditch effort to restore the District Court's "trial immunity" order by contending that the Court of Appeals lacked jurisdiction to review it. Pet. 16-19. But he makes no effort to show why this jurisdictional issue — which understandably is not even mentioned in his list of questions presented — is worthy of certiorari review. The Eighth Circuit simply applied longstanding principles of pendent appellate jurisdiction, a concept that, as this Court has recognized, has been "endorsed" by all the federal Courts of Appeals. *Swint* v. *Chambers County Comm'n*, 115 S. Ct. 1203, 1209 n.2 (1995) (citing cases from each Circuit).[9] Mr. Clinton does not argue that, in any other Circuit, the jurisdictional ruling would have come out any other way.

Mr. Clinton is wrong in any event. He contends that the question whether he is entitled to a stay of the litigation generally is entirely "distinct" from whether he is entitled to a stay of just the trial. But as *he* presented them in the courts below, these questions were one and the same. In the Court of Appeals, *he* argued that he was entitled, *as a matter of law*, to an immunity or stay as to *all* proceedings, *including* the trial, for one reason, and one reason alone — the fact that he is President of the United States. Ms. Jones' cross-appeal argued an issue that indisputably was inextricably intertwined with Mr. Clinton's — namely, to borrow the District Court's words, whether he was entitled to "a temporary or limited immunity from trial [under] *Fitzgerald*." Pet. App. 70. The Court of Appeals reached the obvious conclusion that both appeals

[9] In *Swint*, the Court observed that it "ha[s] not universally required courts of appeals to confine review to the precise decision independently subject to appeal." 115 S. Ct. at 1211. *Swint* thus did not impugn the viability of pendent appellate jurisdiction; it held only that "there is no 'pendent party' appellate jurisdiction of the kind the Eleventh Circuit purported to exercise" in that case. *Id.* at 1212.

> are resolved by answering one question: is a sitting President entitled to immunity, for the duration of his presidency from civil suit for his unofficial acts? It is difficult to imagine issues more "intertwined" that these, where answering one question of law resolves them all.

Pet. App. 5 n.4. On this point as well, the Court of Appeals was correct, and its holding raises no important question of general applicability for this Court to address.

* * *

The protections Mr. Clinton has sought in this case are unique and unprecedented; they contravene *Fitzgerald*'s explicit language; they require, contrary to *Landis*, the imposition of an insurmountable burden upon a plaintiff to prove that a President is *not* entitled to postpone a lawsuit; and they would prevent a plaintiff such as Ms. Jones from collecting her evidence before memories fade, documents are lost, and witnesses die or become incapable of testifying. In matters having nothing to do with the presidency, Mr. Clinton has sought to make a plaintiff unequal to the President in the eyes of the law. Mr. Clinton has thus demanded an immunity from suit for unofficial acts that would place him, unlike any prior President or public official, above the law. There is no support in reason, the common law, the Constitution, or in simple justice, for his demand. The Court of Appeals correctly rejected it.

CONCLUSION

The petition for a writ of certiorari should be denied.

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REPLY BRIEF

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No. 95-1853

IN THE

Supreme Court of the United States

October Term, 1995

WILLIAM JEFFERSON CLINTON,

Petitioner,

vs.

PAULA CORBIN JONES,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The President's submission is straightforward: No President has ever before been compelled to submit to a civil damages action, directed personally against him, during his term in office. A decision with such serious ramifications for the Presidency and the nation should not be allowed to stand without this Court first considering the President's contention, founded on both the Court's decisions and statements by the Framers, that such lawsuits must in all but the most exceptional cases be deferred until the President leaves office.

Respondent does not -- indeed, cannot -- identify a single instance in which a court has compelled an incumbent President to defend a damages action directed at him personally. Nor does respondent explain why a fragmented panel of the court of appeals, rather than this Court, should decide the extraordinarily important constitutional question of whether a President may be compelled to do so. Instead, respondent's principal contentions are (i) that this is a "one-of-a-kind case" that can be litigated without interfering with the President's conduct of his office (Br. in Op. 8); (ii) that separation of powers principles permit a trial judge to require, review -- and sometimes reject -- specific showings by the President that a matter of state is sufficiently significant to justify altering the litigation schedule (Br. in Op. 12-14); (iii) that *Nixon v. Fitzgerald*, by providing Presidents with absolute immunity from liability for conduct within the "outer perimeter" of official duties, somehow precludes deferral of this litigation (Br. in Op. 16-18); and (iv) that this nation's historic traditions pose no bar to subjecting an incumbent President to civil damages litigation (Br. in Op. 19-20). Respondent is wrong at each turn.

1. This case is evidence, if any is needed, of the wisdom of the Court's observation in *Nixon v. Fitzgerald* that "the sheer prominence of the President's office" makes him "an

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easily identifiable target for suits for civil damages." 457 U.S. 731, 752-53 (1982). Respondent's brief in opposition characterizes this lawsuit as a "very simple dispute about what happened in a very short encounter between two people in a room," and one in which "[d]iscovery and trial . . . will not be burdensome." Br. in Op. at 10. The record, however, reveals that respondent's attorneys in fact intend to use this case as a vehicle for a far-reaching inquiry:

> We'll be able to ask the President certain pertinent questions . . . . Was this a pattern of conduct that involved the use of police for private functions that would not be . . . part of their duty? Are there other women involved? Who are they? . . . [A]ll is on the table in the discovery deposition, including evidence that can lead to admissible evidence. So it's a pretty wide-ranging effort . . . .

C.A. App. 122-23 (Tr. of ABC's *Nightline* (Dec. 28, 1994)). Respondent's counsel also stated that they will "exhaustively pursue" this line of inquiry with other witnesses, and may seek to compel an unprecedented physical examination of the President. C.A. App. 117-18 (Tr. of CNN's *Daybreak* (Dec. 29, 1994)).

Respondent, in other words, envisions litigation that not only threatens the President with $700,000 in damages and seeks to impugn his reputation, but that is specifically calculated to entangle him in the "discovery deposition" process. In addition, the district court found that discovery could not be conducted on even the claims against the President's co-defendant "without the heavy involvement of the President through his attorneys." Pet. App. 76. The inevitable consequence of such purportedly "uncomplicated" litigation (Br. in Op. i) will be substantially to divert the President from his Article II responsibilities.

It takes but a single lawsuit of this kind, in *Fitzgerald's* words, to "distract a President from his public duties, to the

detriment of not only the President . . . but also the Nation that the Presidency was designed to serve." 457 U.S. at 753. That danger is especially great in the modern setting, where wide-ranging discovery is permitted and instantaneous, nationwide publicity is routinely used as a tool by litigants.

Moreover, the dangers of abuse of litigation against an incumbent President are not limited to a single case. Respondent reiterates the panel majority's conception that "the universe of potential plaintiffs" who might sue an incumbent President -- for reasons of partisanship, extortion, or publicity-seeking -- is "small[]." Br. in Op. at 11 (quoting Pet. App. 15). But no person becomes President without having been highly prominent for an extended period in the public or private sector. If the Court allows this case to proceed, it is difficult to believe that other potential litigants, encouraged by the spectacle, will not come forward in this or future Administrations, to use a lawsuit to distract, harass or obtain personal information about a President by "alleging unwitnessed one-on-one encounters that are extremely difficult to dispose of by way of pretrial motion." Pet. App. 27 (Ross, J. dissenting).

Respondent asserts that there is no extensive history of litigation against a sitting President being used for this purpose. Br. in Op. at 11. But there was no history of Presidents being sued for official acts before *Nixon v. Fitzgerald*. *See* 457 U.S. at 753 n.33.[1] The Court nonetheless granted certiorari in *Fitzgerald*, and afforded President Nixon an absolute immunity -- a much broader protection than is sought here --

---

[1] The Court in *Fitzgerald* attributed this to the fact that *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), which permitted damages actions against federal officials for violations of the Constitution, was of relatively recent vintage. But common law tort actions had long been available against federal officials, as Justice Harlan noted in *Bivens*. *See* 403 U.S. at 400 n.3, 409 (Harlan, J. concurring). The more likely explanation for the absence of suits against the President is that -- as we showed in the petition -- it was universally understood that the President could not be sued for damages while in office. *See Fitzgerald*, 457 U.S. at 758.

because it recognized the danger that opportunistic litigation presents to the office of the Presidency. 457 U.S. at 753. The risk of opportunistic litigation is no less in a case of this kind than it was in *Fitzgerald*, and this Court's review is no less warranted here.

2.a. Respondent embraces the panel majority's view that the risk such litigation poses to the Presidency can be managed by allowing trial judges to exercise discretion over the scheduling of litigation. We explained in the petition why this supposed cure is worse than the disease: it will precipitate repeated confrontations between the President and federal or state trial courts, as those courts pass judgment on a President's requests that the litigation schedule be modified because of the demands of his office. As Judge Ross asked below (Pet. App. 29):

> Is it appropriate for a court to decide, upon the President's motion, whether the nation's interest in the unfettered performance of a presidential duty is sufficiently weighty to delay trial proceedings? Once a conflict arises between the court and the President as to the gravity of an intrusion on presidential duties, does a court have the authority to ignore the President's request to delay proceedings? . . . [C]an a court dictate a President's activities as they relate to national and international interests of the United States without creating a separation of powers conflict?

The brief in opposition seeks to create the impression that trial judges will be highly deferential to the demands of the Presidency. It repeatedly quotes Judge Beam's formulation, according to which a trial judge may "reschedul[e] any proposed action by any party at any time should she find that the duties of the presidency are even slightly imperiled." Pet. App. 25, *quoted in* Br. in Op. 8, 12. But that is not the standard established by the prevailing opinion below, which stated that the President could obtain relief from a trial judge

only if he could show that a specific aspect of the proceedings "interfer[ed] with specific, particularized, clearly articulated presidential duties." Pet. App. 16.

Moreover, under either standard, once trial judges are vested with discretion, they inevitably will exercise it in different -- and sometimes highly intrusive -- ways. While some may be deferential to the President, others surely will not be. And the affront to the separation of powers inheres in the very fact that a trial judge is empowered to review the President's official responsibilities to determine whether he should instead devote his attention to a private civil action.

One need look no further than this case to see the pitfalls in authorizing courts to review such matters. Here, the district court made a specific case-management determination, based on the particular facts of this case, that the trial should be stayed until the President leaves office. Pet. App. 70-71. The panel majority, notwithstanding its purported reliance on the discretion of trial judges, promptly reversed the stay as an abuse of discretion, without even explaining why the district court's evaluation of the facts was mistaken. Pet. App. 13 n.9.

This clash between the district court and the court of appeals -- and the disagreement within the court of appeals even as to the appropriate legal standard -- is symptomatic. It shows that the separation of powers cannot reliably be protected by requiring the President to make ad hoc showings about how specific aspects of the litigation will affect his ability to carry out his official duties. It also underscores the need for this Court to review this important issue.

b. In arguing that courts can oversee Presidential involvement in civil damages litigation, respondent, like the panel majority, relies heavily on the handful of cases in which Presidents have testified as third-party witnesses in criminal proceedings. Br. in Op. 12-13. The lesson of those cases, however, is the opposite of what respondent suggests: they

show how difficult it is for courts to reconcile the demands of the judicial process with the responsibilities of the executive branch.

A President who testifies as a witness is involved in a one-time encounter with the judiciary. By contrast, a defendant faced with personal liability will be involved in every phase of the litigation. The opportunities for tension and conflict between the President and the courts thus increase exponentially. Moreover, a President who is a third-party witness ordinarily faces little risk to his reputation or financial well-being. When a President is a defendant in a damages action, the stakes are incalculably greater. The burdens and distractions that ensue inevitably will be far more intrusive than when the President is a witness.

Nonetheless, even in the far less burdensome context of third-party testimony by Presidents, the experience has been that the process of accommodation is painstaking[2] and should be undertaken only in cases of compelling need.[3] Even when

[2] *See, e.g., United States v. Poindexter*, 732 F. Supp. 142, 148-50, 155-59 (D.D.C. 1990) (court limited defendant to written interrogatories and videotaped deposition, and reviewed questions to be asked in advance); *United States v. McDougal*, No. LR-CR-95-173 (E.D. Ark. Mar. 20, 1996) (permitting presidential testimony only by way of videotaped deposition conducted at the White House, supervised by the trial court via videoconferencing to avoid abuses, after which only directly relevant portions would be shown at trial).

[3] *See, e.g., Poindexter*, 732 F. Supp. at 147 (President would be compelled to provide testimony for criminal trial only if court is "satisfied that his testimony would be material as tested by a meticulous standard, as well as being necessary in the sense of being a more logical and more persuasive source of evidence than alternatives that might be suggested") (footnote omitted); *United States v. North*, 713 F. Supp. 1448, 1449 (D.D.C. 1989) (compelled testimony of former President in a criminal proceeding must be justified by a "sufficient showing . . . that the . . . President's testimony is essential to assure the defendant a fair trial"), *aff'd*, 910 F.2d 843 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991).

the President is just a witness, the principle of separation of powers is strained to the limit. The course respondent suggests -- giving a trial court the power to manage the President's priorities to accommodate personal damages litigation -- pushes the separation of powers past the breaking point.

Finally, even in cases where only testimony or evidence has been sought from a President, this Court repeatedly has drawn a clear line between criminal proceedings -- where a compelling public interest is involved -- and civil damages proceedings. *See Nixon v. Fitzgerald*, 457 U.S. at 754 & n.37; *United States v. Nixon*, 418 U.S. 683, 712 n.19 (1974). The fact that Presidents on occasion appear as witnesses in criminal proceedings, therefore, does not support the conclusion that a President is required to participate in a private civil damages action in any capacity -- and certainly not as a defendant.

3.a. The brief in opposition attempts to create the impression that the President seeks to be held absolutely immune from liability for actions he took while he was not President. The President seeks no such thing, and respondent's elaborate arguments against that proposition (Br. in Op. i, 9, 15-18, 20-22) are simply a determined effort to confuse the issue. Rather, throughout this case, the President has asserted that the responsibilities of the Presidency warrant a stay of litigation until he leaves office. He does not seek to extinguish the respondent's rights to pursue her claims, does not seek to evade accountability, and remains subject to the risk of damages.

And while respondent, like the panel majority, engages in overblown rhetoric to the effect that the President is seeking to place himself "above the law" and that the relief he seeks is "unprecedented," even respondent is forced to concede the validity of the underlying principle for which we contend. She acknowledges that the President is not like any other litigant, and that the courts must show "deference" and

must accommodate the President's unique responsibilities. Br. in Op. 12-14.

b. Respondent and the panel majority suggest that *Fitzgerald* affirmatively rejected the President's position here. Pet. App. 8-9, 10-11; Br. in Op. at 16, 23. This suggestion is, to say the least, odd: in *Fitzgerald*, even the plaintiff, although seeking to hold then-former President Nixon liable in damages, conceded in his brief that litigation against a sitting President could be stayed[4] -- reflecting the universal understanding, until this case, that a President cannot be subjected to personal damages litigation during his term of office. The issue in *Fitzgerald* was whether a President enjoys absolute immunity from liability for all his official acts. The Court decided that the President, alone among all public officials, is entitled to this exceptional protection. That conclusion is fully consistent with our view that a President who is sued for acts outside the scope of his office is entitled to the much more limited relief of temporary insulation from litigation. Indeed, as we showed in the petition, a crucial aspect of the Court's reasoning in *Fitzgerald* was that personal damages litigation can divert a President from his official duties.[5]

Respondent (Br. in Op. 9, 16) makes much of Chief Justice Burger's statement in *Fitzgerald* that "[t]he doctrine of absolute immunity does not extend beyond [official] actions," -- a statement with which we of course agree. 457 U.S. at 761 n.4. (Burger, C.J., concurring); *see also id.* at 759. Respondent does not mention that Chief Justice Burger also said

[4] Brief for Respondent A. Ernest Fitzgerald, Nos. 78-1783 and 80-945 (Sup. Ct. filed Oct. 29, 1981) at 28.

[5] The respondent suggests that the President is entitled to the relief sought here only if provided for in an act of Congress. Br. in Op. 11. We disagree. The relief sought here is required by the singular nature of the President's constitutional duties, and by principles of separation of powers. *Fitzgerald*, 457 U.S. at 749. The President does not rely on, or claim any relief under, the Soldiers' and Sailors' Civil Relief Act of 1940 (50 U.S.C. app. §§ 501-525 (1988 & Supp. V 1993)), or any other legislation.

that "[t]he need to defend damages suits would have the serious effect of diverting the attention of a President from his executive duties," and cautioned that "litigation processes . . . can be and are used as mechanisms of extortion." *Id.* at 763.

4. Respondent asserts (Br. in Op. 19-20) that President Jefferson "lost" his argument that subjecting Presidents to a Court's jurisdiction undermines the separation of powers. In fact, our history -- beginning at least with President Jefferson and extending through the *Burr* cases, the *Fitzgerald* case, and *United States v. Nixon* and its progeny -- teaches that subjecting a sitting President personally to the process of the courts is something that should be done only in cases of imperative need, and then only to the most limited extent possible. *See Fitzgerald*, 457 U.S. at 753-54.[6]

[6] In the face of this Court's demonstration in *Fitzgerald* that the Framers contemplated that Presidents would not be subject to suit while in office (457 U.S. at 751 n.31), respondent cites four cases. Br. in Op. 20. Three involve the entirely different question of whether a President can be required to be a witness in a criminal proceeding. *See supra*, p. 6-7. The fourth, *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1973) (en banc) ("*NTEU*"), is inapposite and of questionable vitality, and in any event supports our position. In *NTEU*, the President was sued for injunctive relief in his official capacity, and was not required to defend the litigation personally. The court of appeals stated that it had the authority to mandamus President Nixon to perform a ministerial duty, but refrained from exercising that authority "in order to show the utmost respect to the office . . . and to avoid, if at all possible . . . any clash between the judicial and executive branches." The court proceeded by way of declaratory judgment instead. 492 F.2d at 616. Contrary to respondent's suggestion, *NTEU* demonstrates that courts go to great lengths to avoid entangling the President in their jurisdiction. Moreover, even the viability of the opinion expressed in *NTEU* -- that a President could be enjoined -- is in doubt, in view of the more recent discussion of that issue in *Franklin v. Massachusetts*, 505 U.S. 788 (1992). *See id.*, 505 U.S. at 802-03 (plurality opinion of O'Connor, J.) (citing *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 498-99 (1867)); *id.* at 826 (Scalia, J., concurring).

No court has ever, until now, required a sitting President to defend a civil damages action directed at him personally. In fact, no court has ever required a President to testify in a civil case as a witness. What respondent seeks -- allowing a sitting President to be sued for damages in his personal capacity -- would be an intrusion far beyond anything that has ever before been allowed, or even contemplated. To permit such an intrusion, without even so much as this Court's review, is utterly unwarranted.

For these reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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